IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1378

JAPAN LINE, LTD., *et al.*,
Appellants,

v.

COUNTY OF LOS ANGELES, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE COUNCIL OF EUROPEAN AND JAPANESE NATIONAL SHIPOWNERS' ASSOCIATIONS

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INTEREST OF AMICUS CURIAE

The Council of European and Japanese National Shipowners' Associations ("CENSA") is an international organization whose membership consists of the national shipowners' associations of the following countries: Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden and the United Kingdom, together with individ-

ual liner companies (including consortia) from those countries which trade to or from the United States.

CENSA was established in 1963 in order to provide a medium for consultation and cooperation on common problems affecting European and Japanese shipowners. The shipowners of the CENSA countries own over 50% of the world's merchant fleet, including almost 60% of the containers used in international shipping.

CENSA is filing this Amicus Curiae Brief because of its concern that the ruling below—by abrogating the home port doctrine presently followed by every major maritime nation in the world—will result in multiple taxation of foreign-owned container fleets and may cause unfortunate counter-measures by other nations and disruption of international trade relations.

CONSENT OF THE PARTIES

Amicus is filing this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

ARGUMENT

I. THE DECISION BELOW UNJUSTIFIABLY ABROGATES THIS COURT'S HOME PORT DOCTRINE, WHICH HAS PROTECTED INTERNATIONAL COMMERCE FROM THE BURDENS OF MULTIPLE TAXATION AND INTERNATIONAL JURISDICTIONAL DISPUTES.

For more than one hundred years the United States, like every major maritime nation in the world, has followed the doctrine that an instrumentality of international commerce can be taxed only at its "home port." The California Supreme Court's decision under review here improperly abrogates this home port doctrine, in violation of federal constitutional principles and in disregard of the fundamental policy reasons for the establishment and continuation of the doctrine.

Appellants' Brief filed with this Court sets forth in detail the numerous constitutional infirmities of the decision below. Amicus CENSA adopts those legal arguments presented by Appellants and will not repeat them here. CENSA does wish, however, to add or emphasize a few key points which it believes are essential to an understanding of the continued necessity for the home port doctrine and the severe consequences that might follow from its repudiation.

The home port doctrine was first enunciated by this Court in *Hays* v. *Pacific Mail Steam-ship Co.*, 58 U.S. (17 How.) 596 (1854), striking down a property tax levied by the State of California on ocean-going steamships whose home port was outside that state. In *Hays* and its progeny the Court held that such a tax by a state on a vessel with a home port outside the state "is an interference with the commerce of the country not permitted to the States." *Morgan* v. *Parham*, 83 U.S. (16 Wall.) 471, 479 (1872). *See also Southern Pacific Co.* v. *Commonwealth of Kentucky*, 222 U.S. 63, 69 (1911) ("this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear that the vessels had an actual situs elsewhere").

The home port doctrine set forth in *Hays* serves several extremely important functions. First, it allows for taxation by the jurisdiction likely to have the most significant contacts with the vessel involved. Moreover, the doctrine provides an easily applied rule, with the beneficial result of minimizing international disputes over each country's taxing jurisdiction or the fairness of its taxing formula. Finally, adoption of the doctrine by all the major maritime nations has served to eliminate the dangers of multi-

ple taxation of the same property by different countries using inconsistent taxing systems.

The court below, however, has ruled that a state or municipality no longer must apply this salutary rule to international commerce, simply because a different rule is now used for American interstate commerce. The California court's application of interstate commerce principles to international trade is unsupportable as a matter both of constitutional law and of logic.

In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), this Court ruled the home port doctrine inapplicable to interstate commerce, upholding the validity of an allocation, or apportionment, system for *ad valorem* property taxes on vessels serving inland waters. The *Ott* Court expressly refused to reach the question of whether a state constitutionally can apply such a system to "ocean carriage," or international commerce, as Appellees seek to do here. *See id.* at 173-74.

Similarly, in *Dep't of Revenue* v. *Ass'n of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978), this Court upheld application of a business and occupation tax on stevedoring, but only after emphasizing that "[n]o foreign business or vessel is taxed. [The taxpayers], therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States." *Id.* at 1401. Moreover, in *Michelin Tire Corp.* v. *Wages, Tax Comm'r*, 423 U.S. 276 (1976), the Court upheld a state property tax "on imported goods that are no longer in import transit," *id.* at 286, while noting that such a tax would not reach imports destined for inland states and using "transportation methods such as air freight *and containerized packaging*." *Id.* at 288 (emphasis added).

The distinction clearly emerges from these cases between interstate commerce—as to which an apportioned

tax is permissible—and international commerce—as to which the home port doctrine remains viable and thus no tax, apportioned or otherwise, can be levied on the vessel except at its home port. This distinction is a sound one that responds to practical realities as well as to constitutional principles. An apportioned tax is workable in the interstate commerce area because this Court is available to review any disputes between states or any contentions that different state apportionment formulas are inconsistent and would result in multiple taxation. However, as was recognized by the Superior Court judge in the decision reversed by the California appellate courts below, no such system for arbitration of apportionment disputes is available for international commerce (Jurisd. Statement, at 28a):

> To consider proration of taxes with foreign entities is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason, our Federal Courts have consistently held that vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only.

Moreover, it must be emphasized that so long as other nations continue to follow the internationally accepted home port doctrine, ships from those nations—which include all the CENSA members' countries—will automatically be subject to multiple taxation insofar as they utilize ports in a state, like California, following the apportioned tax system. The reason for this is that foreign-owned ships are taxed on their full value by their home port nations. If states are free to levy a tax based on the differing apportionment approach, neither the California courts nor even this Court would have the power to eliminate the resulting multiple taxation, which un-

fairly and illegally [1] would discriminate against ships and containers from foreign nations.[2]

It is important to note that international treaties and trade relationships also suggest the need for a different rule regarding states' tax powers over foreign, as opposed to interstate, commerce. It simply makes no sense for the United States government to be entering into solemn treaty obligations and agreements with foreign nations, while at the same time fifty individual states and all their municipalities would be free to tax foreign commerce from those nations in ways that might be (or be perceived as) inconsistent with the national government's obligations and agreements. Indeed, the Framers of the Constitution intended that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power . . . ." *Michelin Tire Corp.* v. *Wages, Tax Comm'r*, 423 U.S. 276, 285 (1976).[3]

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[1] As is set forth in Appellants' Brief, such multiple taxation on foreign ships and containers, but not on U.S. vessels, would violate this country's treaty obligations, including those to CENSA member nations.

[2] If an apportionment system were utilized by all American states, U.S.-owned vessels logically could not be taxed on more than 100% of their assessed value; however, vessels serving the U.S., but based in countries continuing to follow the home port doctrine, would be taxed on more than 100% of value.

[3] *See Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 228-29 (1824) (Johnson, J. concurring) (emphasis in the original):

> Power to regulate *foreign commerce*, is given in the same words and in the same breath . . . with that over the commerce of the States. . . . But the power to regulate *foreign* commerce is necessarily exclusive. . . . Whatever regulations foreign commerce should be subjected to, in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

Even when acting within an area of traditional state jurisdiction, such as probate law, states are constitutionally required to avoid any interference with international relations. *See Zschernig* v. *Miller*, 389 U.S. 429, 440-41 (1968):

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. . . . The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. . . . Where [state] laws conflict with a treaty, they must bow to the superior federal policy. . . . The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

Thus, without regard to the rules that may be appropriate for the very different circumstances of interstate commerce, practical realities and constitutional principles demand continued application of the home port doctrine for international commerce.

II. IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE FAR-REACHING AND EXTREMELY DAMAGING EFFECTS ON INTERNATIONAL COMMERCE AND ON THE ECONOMIC INTERESTS OF THE UNITED STATES.

In ruling that a state or municipality is free to tax vessels or other instrumentalities of international commerce, the court below totally ignored the dangerous consequences of its unprecedented decision. This Court should reassert the applicability of the home port doctrine to such commerce in order to avoid the unfortunate possibility of foreign counter-measures and the disruption of

international trade which would flow from the decision below.

In assessing the impact of the lower court's ruling, it must be noted that far more is at stake than the few hundred thousand dollars of tax now being levied annually by these particular municipalities against these six Appellants in the instant case. The containerized shipping business, although relatively new, is an extremely large and growing form of worldwide trade. Amicus CENSA estimates that there currently are almost 2,000,000 twenty-foot equivalent units ("TEU")[4] of shipping containers used in world trade, with a current fair market value of approximately two billion dollars. In 1977, approximately 900,000 TEU's of foreign-owned containers were used in United States international commerce.[5]

If the California ruling were allowed to stand, it is reasonable to assume that most other states and municipalities would follow in seeking to increase their always-insufficient revenues through the politically attractive and lucrative means of taxing foreign-owned containers passing through their territory. One state, Oregon, has already announced it intends to join California in assessing such a tax; other states are sure to follow. Indeed,

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[4] The "TEU," or twenty-foot equivalent unit, measure converts container volume into the equivalent number of standard, twenty-foot containers. Most shipping containers are either twenty feet or forty feet in length, approximately nine feet in height, and eight feet in width.

[5] CENSA estimates that the current fair market value, after depreciation, of these foreign-owned containers is $900,000,000. Applying the industry rule-of-thumb that such containers spend approximately one third of each year in their home port country or other overseas location, one third on the seas, and one third at some coastal or inland location in the United States, the application by all states of California's allocation system would result in a pro-rated fair market value of $300,000,000 worth of containers which U.S. States and municipalities would be free to tax.

under California's allocation system virtually any state or municipality in the Union could gain some advantage from such a tax, since containers are unloaded and shipped via truck and rail through and to almost all inland locations in this country. Thus, affirmance of the decision below would lead to a total state tax burden on containers amounting to many, many millions of dollars.

Moreover, the necessary implications of the decision below by no means are limited to containers. In rejecting the home port doctrine of *Hays* and its progeny, the California court has cleared the way for a similar allocated tax on every foreign-based ship and international passenger or freight airplane that arrives on its shores. The assessed value of all such vessels arriving in California alone is of staggering proportions. Moreover, as noted above, such a vast new source of tax revenue is unlikely to escape the attention of other states and municipalities. Affirmance here would allow every locality with an ocean port or an international airport to begin assessing and taxing on a pro rata basis every ocean vessel, each jumbo jet or freight airplane landing even briefly in its area, even though these ships and planes are owned, registered, based, *and taxed* in their home port countries. Since CENSA is aware of no maritime nation whose law provides a "credit" against home port property taxes for such taxes paid to another nation, the result would be multiple taxation of foreign-owned vessels. This would create an unfair advantage for U.S.-owned vessels in international commerce, in violation of the non-discrimination provisions of various international agreements entered into by the United States.

Even more significantly, CENSA believes that the decision below is likely to lead to counter-measures being taken against U.S.-owned vessels by this country's trading partners. It is simply unrealistic to assume that all the other nations which follow the home port doctrine will

sit by idly and watch their containers, ships and planes being subjected to multiple taxation by states or municipalities here, without taking any action in response—such as imposing their own taxes on United States vessels that land in their countries.[6]

As is indicated in Appellants' Brief, numerous foreign countries—including many of the CENSA members' nations—already have lodged formal protests with the United States Department of State against what they reasonably view as an unjust and discriminatory tax in violation of international law and agreements. The potential danger of "retaliation" by other countries and possible disruption of international trade was summarized well by the Federal Republic of Germany in its June 23, 1978, filing with the State Department, which focused especially on the effects on air transportation of California's allocation system:

> [A]part from the distortion of cost structures between airports the California tax example might induce other States to levy comparable taxes on foreign aircraft and eventually on other modes of international transportation as well. Retaliation by other countries might then subject international carriers to multiple taxation which would be clearly in contradiction to efforts to facilitate international Commerce.

[6] Government figures indicate that there currently are 797,690 TEU's of containers owned by United States steamship and leasing companies and used in international commerce. CENSA estimates that the fair market value of these containers is approximately $798,000,000. Thus, other nations would be free to levy taxes on a pro-rated value of $266,000,000 worth of U.S. containers, *see* note 5, *supra*, and possibly even more if those nations do not limit themselves to the allocation formula adopted by California.

It is interesting to note, also, that worldwide abandonment of the home port doctrine would enable those U.S. trading partners who have no substantial merchant marine of their own to tax United States vessels without any reciprocal tax being recovered by this country.

Similarly, the Government of Japan in an Aide-Memoire to the State Department has cautioned that California's property tax on containers owned by foreign shipping lines constitutes double taxation and "impedes the smooth development of trade between the two countries." Jurisd. Statement, at 50a.[7]

Another indication of the possibility of foreign countermeasures against such a discriminatory United States tax arose at the June 12, 1978, meeting of the Council of European Communities. At that meeting, the Council adopted a resolution proposed by the European Economic Community (the "Common Market"), calling for concerted action by the Common Market countries "to decide suitable counter-measures against offending countries" that engaged in discrimination against "the maritime interests of Member States."[8]

[7] Other countries that have lodged similar protests against California's action are: Canada, Denmark, Finland, France, Federal Republic of Germany, Japan, Mexico, the Netherlands, New Zealand, Norway, Sweden and the United Kingdom.

[8] *See* Minutes of 521st Council Meeting—Transport—Council of the European Communities, at 20-21 (June 12, 1978):

> ACTIVITIES OF CERTAIN NON-MEMBER COUNTRIES IN THE FIELD OF MARITIME TRADE
>
> In the light of difficulties observed as a result of the activity of certain third countries in the field of maritime trade the Council examined measures to be taken by the Community to counteract this trend. It recorded its agreement on a framework decision binding each Member State to take steps to set up a system by which to gather information on the activities of the fleets of countries whose practices are detrimental to the maritime interests of Member States, in particular insofar as these activities undermine the competitivity of Member States' fleets engaged in international maritime trade.
>
> To attain these goals each Member State must be able to obtain information on the level of services offered, the nature, volume, value, origin and destination of goods loaded and unloaded and on the rates charged for these services.

[Footnote continued on page 12]

A recent letter from the Office of the United States Special Representative for Trade Negotiations attests to the fact that CENSA's concern regarding possible countermeasures against United States ships and potential disruption of international trade is not mere speculation. As stated by the General Counsel of that Office, the California tax "may well constitute a non-tariff trade barrier" that will complicate current international negotiations, and "significant problems may arise on the part of the trading partners of the United States, not only with respect to containers, but also in other areas through retaliation and the imposition of similar types of levies." Jurisd. Statement, at 48a-49a.[9]

The Framers of the United States Constitution wisely prohibited individual states from levying tariffs or otherwise interfering in the regulation of foreign policy and trade. Fifty separate states, with their countless municipalities, cannot participate in international trade negotiations or develop appropriate reciprocal tax structures. Yet, under the ruling below, each would be able to levy taxes on a portion of this nation's foreign trade, raising the spectre of unfortunate responses and countermeasures by this country's foreign trading partners.

[8] [Continued]

The Council will decide on the countries to whose fleets the all-round Community system of information will apply.

On this point the Council instructed the Permanent Representatives Committee to work out in conjunction with the Commission measures for implementing these provisions, for adoption by the Council at its next transport meeting in November, bearing in mind the wishes expressed by delegations as regards the activities of State-trading countries and flag of convenience countries.

On the basis of the information gathered, the Council will be able to decide suitable counter-measures against offending countries. These will form part of national legislation, be applied in concert, and might include restrictions, depending on the circumstances.

One delegation gave its agreement subject to confirmation, and will make known its firm position at the earliest opportunity.

[9] Similarly, in a letter to Governor Jerry Brown, dated April 17, 1978, The Honorable Julius L. Katz, Assistant Secretary of State for Economic and Business Affairs, warned of "the likelihood of retaliatory taxation measures against U.S. citizens engaged in ocean commerce abroad" if California fails to change its current combiner tax policy.

Amicus CENSA respectfully submits that this Court should retain the home port doctrine—which has been so long and universally applied by the world's major maritime nations—so that individual states and localities will not become hopelessly and dangerously enmeshed in international trade and taxing disputes that surely would result in damage to the economic interests of the United States and all its trading partners.

CONCLUSION

For the foregoing reasons, Amicus CENSA urges this Court to adhere to the home port doctrine and to reverse the decision below.

Respectfully submitted,

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